No. 6077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS DAY COMPANY (a corporation) and WHITMAN SYMMES,

Appellants,

vs.

CLAUDE R. KING, Receiver of Thomas Day Company, ROBERTS MANUFACTURING COMPANY (a corporation), and GILL VIRDEN COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEE, CLAUDE R. KING, RECEIVER OF THE THOMAS DAY COMPANY.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF THE CASE.

The statement of the case is correctly set forth in appellant's brief. Appellant admits that certain points assigned as error are not well taken (Appellant's Brief page 6) and the issue on this appeal is thereby narrowed to one question.

Did the Court have jurisdiction to authorize a sale wherein the purchaser was allowed to hold itself out as the successor to the Thomas Day Company.

I.

THE SALE DID NOT VIOLATE ANY OF THE LAWS OF THE STATE OF CALIFORNIA.

Counsel states that the management and operation of the property must be in accordance with the requirements of the valid laws of the State of California.

There are two answers to this contention. In the first place we are not now concerned with either *management* or *operation* of the property. The property and all of the assets have been sold.

Secondly the *sale* which is under consideration does not depend for its validity on effect upon any positive law of the State of California; it is enough if the sale and the terms thereof do not violate any law of the State of California.

Next it is contended that the Federal Court will be governed by the state laws in receiver's sales. In an equity receivership, such as this one, there are no laws of the state to be followed.

II.

RESPONDENT DOES NOT CONTEND THAT THE SALE OF THE ASSETS OF THE CORPORATION WORKED A DISSOLUTION.

No contention has been made by respondent Receiver that the corporation has been dissolved. Admittedly the only method of dissolving the corporation is the mechanism provided by the laws of the state of incorporation.

But the decree confirming the sale does not attempt to work a dissolution of appellant. On its face the decree does not show a lack of jurisdiction.

III.

THE APPOINTMENT OF THE RECEIVER, WHILE NOT DISSOLVING THE CORPORATION, OPERATED TO SUBJECT ALL OF THE ASSETS OF THE CORPORATION TO THE JURISDICTION OF THE DISTRICT COURT.

This includes the goodwill and trade name; and this is all that was sold by the Court.

(a) Goodwill as an asset in the jurisdiction of the court.

At the outset it might well be remembered that the decree appointing the Receiver in this action was consented to by the Company. This under the practice now recognized by the Federal courts, sitting in equity, of extending the consent receivership to the situation of private corporations which are solvent at the time but presently unable to meet their obligations by reason of 'frozen assets'."

First National Bank v. Stewart Fruit Co., (1927) 17 Fed. (2d) 621.

The plan of the receivership was the operation of the business as a going concern and the liquidation of its frozen assets for the purpose of meeting its liabilities. The appellants here consented to the order of appointment. It developed after further consideration that the inventory of the business had been

overvalued and that the concern was in fact insolvent. At a meeting of the creditors it was decided to offer the business as a whole to the highest bidder for cash. (Transcript pages 27, 28.)

The highest bid was submitted by a competitor of the insolvent concern.

In this situation the Honorable A. F. St. Sure confirmed the sale of the goodwill. As an incident thereto the order confirms the sale in the following language:

> "The business and goodwill of the business of the Thomas Day Company; *the right of Roberts Manufacturing Company to hold itself out as the successor of Thomas Day Company and as having acquired the goodwill thereof.*"
>
> (Transcript page 45.)

It will be noted that the sale of the goodwill and the right of the purchaser to hold itself out as the successor are inseparably interwoven.

Under the consent decree the Receiver succeeded to all of the assets of the corporation. The decree provides:

> "It is hereby ordered, adjudged and decreed that Charles F. Duval be, and he is hereby, appointed Receiver of defendant, Thomas Day Company, and of all of the property and assets of said defendant."
>
> (Transcript page 11.)

The goodwill of a business in an asset in the hands of a receiver.

Tardy's, Smith on Receivers, 2d Ed. (1920). Vol. 2, page 1791, Section 645.

> Goodwill is an asset in bankruptcy and it is the subject of sale with, but only with, the business in which it has been used.
>
> *Nims, Unfair Competition and Trade-Marks,* 3d Edition (1929), page 82, Section 26.

(b) The right to use the term "successor to" is part of the sale of the goodwill.

One who purchases the goodwill of a firm or corporation is entitled to hold himself out as the "successor to" the old firm or corporation.

In *Smith v. David H. Brand & Co.,* 67 N. J. Eq. 529, 58 Atl. 1029, a partnership under the name "Brand and Smith" sold all of its assets and "goodwill" to a corporation named "David H. Brand & Co." This corporation advertised itself as "Successors of Brand & Smith." A former partner sought to enjoin the use of this description and the Court denied the injunction.

This is likewise true in the case of a sale by a corporation of its goodwill and trade name. In *Van Dyk v. Van Dyk & Reeves,* 245 N. Y. 516, (1927) 157 N. E. 840: sustaining 217 App. Div. 781, 217 N. Y. S. 105; the Court considered the following situation:

An action was brought by a stockholder of a New York Corporation whose assets, corporate name and franchises had been sold in receivership proceedings under an order of the United States District Court, to restrain the use of the corporate name by a new corporation, to which the assets had been assigned by the purchaser from the receiver. The defendants moved to dismiss for failure to state a

cause of action. The motion was denied by the trial Court; reversed in the Appellate Division and the reversal sustained by the Court of Appeals.

The Appellate Division held that the Federal Court had jurisdiction of the old corporation and of plaintiff and had power to restrain the old corporation from making any use of the corporate name that would interfere with the good will bought by the new corporation; and consequently plaintiff was not entitled to equitable relief, and that the question whether, so long as the old corporation remained undissolved, the new corporation could lawfully be permitted to incorporate under the same corporate name, was a matter with which the State and not this plaintiff was concerned.

This decision was affirmed by the highest Court in New York State. It seems to be the only case directly in point which our limited facilities have been able to find.

In that case the language of the Appellate Division is equally applicable to a certain phase of this case. After stating the facts the Court declared:

> "The old corporation had no assets, is not doing business of any kind, and seems to be defunct. No injury, therefore, could come to it or the plaintiff by the use by the defendant corporation of the name of the old corporation. On the record before the Court it clearly appears that the action is not brought in good faith, but solely for the purpose of harassing the defendant corporation. There is not a suggestion that the old corporation is likely to continue business."
>
> (217 N. Y. S. 105.)

IV.

THE PLAINTIFFS ARE NOT PROPERLY BEFORE THE COURT IN THAT THEY ARE NOT AGGRIEVED BY THE DECREE OF CONFIRMATION OF SALE.

At the time the sale was confirmed no evidence was offered to show any damages to the appellant by reason of the sale.

In fact, under the stockholders liability law, the more realized from the sale the greater the benefit accruing to the stockholders.

No evidence was offered to show that appellants were suffering or about to suffer any damage. Under the order of appointment of the Receiver the appellants could not engage in business without being in contempt of Court. If they have any assets the Receiver is entitled to them.

The insolvent party cannot complain of the sale or use of its name by the purchaser from the Receiver.

In re Sawilowsky, 284 Fed. 975;

See also

Sawilowsky v. Brown, 288 Fed. 533.

V.

THE PROPOSITION THAT A FEDERAL COURT HAS NO JURISDICTION OVER A CORPORATE NAME BECAUSE OF THE SOVERIGNITY OF THE VARIOUS STATES IN GRANTING CORPORATE CHARTERS IS AN OBSOLETE SHIBBOLETH LONG SINCE DISCARDED BY THE COURTS.

In this case the position taken by His Honor Judge St. Sure is well expressed by Judge Lamm in *State v. Shelton,* 238 Mo. 281, 142 S. W. 417:

> "If a court of equity may take over the management of corporate property through its receiver, as we have just held, it may be allowed to act sensibly with it. I hold this truth to be self-evident, viz: One of the inherent powers of a court of equity is the right to act with good sense. If the corporate project has been abandoned, or has broken down, or the property is perishable, and is deteriorating, if there are no corporate means at hand for conserving it, and the interests of creditors and stockholders are best served by a sale, what good reason can be given why the chancellor, who holds the property of an insolvent corporation through his receiver, may not sell it? Why hold it until it becomes worthless? Why return it to the wasteful, inefficient, or corrupt hands from which equity rescued it?"

But, appellants contend, the court, lacking jurisdiction, its hands are fettered and it cannot use ordinary good sense.

Is there some mechanism, some magic formula, under which a Court is deprived of jurisdiction because the right to corporate existence is dependent upon one of the states? It is submitted that there is no such jurisdictional limitation.

The fact is that the corporation has already consented to an injunction which substantially suspended the exercise of the corporate powers in the original bill in this action. (Transcript page 9.)

In numerous cases the Federal courts have enjoined the use of a corporate name, notwithstanding the fact that the name was being permissively used under the laws of the state of incorporation. It is sufficient to

cite but two of a long line of cases illustrating this point.

Hudson Tire Co. v. Hudson Tire and Rubber Corporation, 276 Fed. 59;

Peck Bros. & Co. v. Peck Bros. Co., 113 Fed. 291.

In the latter case the Court expressly refused to follow an Illinois case wherein the Illinois court had reached an opposite conclusion and stated clearly the proposition that it had jurisdiction to adjudicate the use of the corporate name.

The Court said in part:

"There is in the term 'sovereignty' no magic to conjure by * * *."

CONCLUSION.

In conclusion we simply state that the appellant by virtue of the admissions in his brief has narrowed the question down to one of jurisdiction and on the question of jurisdiction both logic and the authorities are against him.

Furthermore, on equitable grounds it would not seem that the parties appealing are properly in good standing before this Court in that they consented to the decree of adjudication and appointment of a Receiver and should not now be heard to complain of a sale which in any event must redound to the benefit of the stockholders and which cannot possibly damage a corporation which is not operating and had no assets and has not offered any proof of any damage real or supposititous.

In the interests of the efficient administration of estates in the hands of Federal equity receivers and in the interests of all creditors of such estates the law should favor sales which realize for the estate the most amount of money that can be obtained. The decree should be affirmed.

Dated, San Francisco,
June 9, 1930.

Respectfully submitted,

KNIGHT, BOLAND & CHRISTIN,
Attorneys for Appellee, Claude R. King,
Receiver of the Thomas Day Company.